

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On January 8, 1990 appellant, then a 30-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral carpal tunnel syndrome due to factors of her federal employment, including sorting mail, lifting stapling, and using a keyboard. OWCP accepted the claim for bilateral carpal tunnel syndrome. It later expanded acceptance of the claim to include right fracture of carpal bones, right knee dislocation, right knee medial meniscus tear, and right ankle sprain. OWCP paid appellant wage-loss compensation on the supplemental rolls from January 29, 1990 through November 16, 1991, and on the periodic rolls, commencing November 17, 1991.

In an October 8, 2003 report, Dr. Warren Williams, a Board-certified neurosurgeon, opined that appellant was not capable of returning to work in any capacity. He noted that she had limitations with regard to sitting, walking, standing, reaching, reaching above her shoulders, twisting, bending, stooping, and operating a motor vehicle. Dr. Williams indicated that appellant could not drive for more than 15 minutes at one time. He advised that she suffered from many conditions and was taking more than 30 medications daily.

On April 19, 2004 OWCP referred appellant, along with a statement of accepted facts (SOAF), for a second opinion examination with Dr. Christopher Cenac, a Board-certified orthopedic surgeon. In a June 14, 2004 report, Dr. Cenac noted his review of the medical record and SOAF. He provided physical examination findings and performed x-rays of appellant's right ankle, right hand, right knee, and left wrist. Dr. Cenac opined that appellant had reached maximum medical improvement (MMI) and had no ongoing residuals for all of her employment-related injuries. He found that appellant could perform sedentary work and was employable as an information clerk, telemarketer, and retail sales person.

On August 11, 2004 OWCP determined that a conflict in the medical opinion evidence existed between Dr. Williams, appellant's treating physician, and Dr. Cenac, the second opinion physician, regarding appellant's work capabilities. It referred appellant's case, along with a SOAF, to Dr. Robert Ruel, a Board-certified orthopedic surgeon serving as the impartial medical examiner (IME).

In a November 3, 2004 report, Dr. Ruel noted his review of the medical record and SOAF. He recounted appellant's history of injury and provided physical examination findings. Dr. Ruel found that appellant had diminished sensation in her right hand. He opined that appellant was at MMI for both wrists and that her osteoporosis and arthritic changes were due to her degenerative arthritis and not her employment factors. Dr. Ruel further found that appellant was at MMI for her right knee, right wrist, and right tibial plateau and did not require further treatment related to her conditions. He opined that appellant was capable of working four hours per day, five days per

week. In an accompanying work capacity evaluation (Form OWCP-5c), dated November 4, 2004, Dr. Ruel outlined appellant's work restrictions.

On March 15, 2005 the employing establishment offered appellant a modified assignment to work a limited-duty position as a mail processing clerk.

In a March 21, 2005 statement, appellant asserted that she was unable to return to work. She submitted notes from her treating physicians and diagnostic studies.

In a letter dated April 6, 2005, OWCP advised appellant that the offered position remained available. It explained that the modified mail processing clerk position was suitable and in accordance with the medical restrictions set forth in Dr. Ruel's November 4, 2004 report. OWCP notified appellant that if she failed to accept the position or to provide adequate reasons for refusing the job offer, her right to compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2). It afforded appellant 30 days to respond.

On May 10, 2005 OWCP advised appellant that it considered the reasons she provided for refusing to accept the offered position and did not find them to be valid. It noted that there was no medical documentation of record to validate her current condition. OWCP provided appellant an additional 15 days to accept and report to the position, and advised that, if she did not report to the job within 15 days of the date of the letter, her wage-loss compensation benefits and entitlement to a schedule award would be terminated. No response was received.

By decision dated May 27, 2005, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement, effective May 28, 2005, pursuant to 5 U.S.C. § 8106(c)(2), as she had refused an offer of suitable work. It found that the offered position was within the restrictions set forth by Dr. Ruel with whom the special weight of the medical evidence rested.

On June 20, 2005 appellant accepted the offer of modified assignment as a limited-duty mail processing clerk and returned to work.

On June 24, 2005 appellant, through her representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 2, 2007. During the hearing, appellant testified that despite successfully returning to work, she was not able to return to work at the time of the offer of modified assignment. She noted that she suffered from seizures, sleep apnea, respiratory conditions, and cardiovascular problems.

Appellant continued to submit medical evidence, including medical reports from her treating physicians and neurological and sleep studies.

By decision dated May 7, 2007, OWCP's hearing representative affirmed the May 27, 2005 decision.

On February 13, 2019 appellant, through her representative, requested reconsideration. Appellant's representative asserted that OWCP asked the second opinion physician, Dr. Cenac, and the IME, Dr. Ruel, leading questions when inquiring as to the etiology of appellant's bilateral upper extremity and right lower extremity conditions. He argued that the opinions of the

physicians should have been excluded. Appellant's representative further contended that OWCP did not adequately consider appellant's depression, post-traumatic stress syndrome, osteoporosis, and rheumatoid arthritis when evaluating her modified job offer.

By decision dated February 27, 2019, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

In a letter dated March 4, 2019, appellant's representative asserted that OWCP did not address his argument that it improperly posed leading questions to Drs. Cenac and Ruel in its February 27, 2019 decision. He requested that OWCP make a determination on the issue of whether leading questions were asked of the examining physicians.

On May 23, 2020 appellant, through her representative, requested reconsideration of the May 27, 2005 decision. Appellant's representative asserted that Dr. Ruel was improperly selected as an IME. He argued that the selection of the IME should be made through a strict rotational system using appropriate medical directories and that the Physicians Directory System (PDS) should be used. Appellant's representative contended that upon request, OWCP failed to provide a bypass history report, Form ME023 (appointment notification report), or any other record that showed that it had properly selected Dr. Ruel as an IME. He asserted that Dr. Ruel's opinion could not be afforded the special weight of the medical evidence and, thus, a conflict of medical opinion remained between Drs. Williams and Cenac.

In a July 21, 2020 e-mail, appellant's representative requested a copy of the bypass history report and Form ME023 to demonstrate how OWCP selected Dr. Ruel as the IME.

By decision dated August 27, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted that appellant's assertion that Dr. Ruel was improperly selected as an IME was made without any supportive evidence. OWCP found that mere allegations were insufficient to establish bias and that its bypass procedures would be presumed unbiased unless proved otherwise.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.³ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁴ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal

³ 5 U.S.C. § 8128(a); C.S., Docket No. 20-1075 (issued December 31, 2020); Y.S., Docket No. 08-0440 (issued March 16, 2009).

⁴ 20 C.F.R. § 10.607(a).

Employees' Compensation System (iFECS).⁵ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁶

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁷ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁸ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard.¹² The claimant must present evidence which on its face shows that OWCP made an error. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is insufficient to demonstrate clear evidence of error.¹³ The Board makes an

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2020).

⁶ *J.J.*, Docket No. 19-0977 (issued December 31, 2020); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *See* 20 C.F.R. § 10.607(b); *W.J.*, Docket No. 20-0489 (issued December 21, 2020); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁸ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 5 at Chapter 2.1602.5 (February 2016).

⁹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 5 at Chapter 2.1602.5(a) (February 2020).

¹¹ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹² *Supra* note 5 at Chapter 2.1602.4(b) (February 2020).

¹³ *J.J.*, *supra* note 6.

independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

OWCP received appellant's request for reconsideration on May 23, 2020, more than one year after the date of the last merit decision dated May 7, 2007. Appellant's request was, therefore, untimely filed. Consequently, she must demonstrate clear evidence of error on the part of OWCP.¹⁵

On reconsideration appellant's representative contended that OWCP failed to document that it had properly selected Dr. Ruel as an IME. However, the Board finds that appellant's representative has raised only a possibility of an improper selection of Dr. Ruel. In order to establish clear evidence of error, the evidence in question must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. However, appellant's representative has failed to provide evidence to support the allegations of clear evidence of error regarding the selection of Dr. Ruel.

Accordingly, the Board finds that OWCP properly denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁴ *Id.*

¹⁵ 20 C.F.R. § 10.607(b); *J.J.*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board